

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>RONALD SAFFNER</b>	:	ORDER
	:	DTA NO. 820288
for Redetermination of a Deficiency or for Refund of	:	
New York State and New York City Income Taxes under	:	
Article 22 of the Tax Law and the New York City	:	
Administrative Code for the Years 1995 through 1997.	:	

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Petitioner, Ronald Saffner, 377 Rector Place, New York, New York 10280, filed a petition for redetermination of a deficiency or for refund of New York State and New York City income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 1995 through 1997.

A small claims hearing was scheduled before Presiding Officer Joseph Pinto at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on Wednesday, September 14, 2005 at 1:15 P.M. Petitioner failed to appear and a default determination was duly issued. Petitioner has made a written request received October 13, 2005 that the default determination be vacated. Petitioner submitted additional information by letter dated November 3, 2005. By letter dated November 30, 2005, the Division of Taxation filed a response in opposition to petitioner's application to vacate the default.

Petitioner, Ronald Saffner, appeared on his own behalf. The Division of Taxation ("the Division") appeared by Christopher C. O'Brien, Esq. (Justine Clarke Caplan, Esq., of counsel).

Upon a review of the entire case file in this matter as well as the arguments presented for and against the request that the default determination be vacated, Chief Administrative Law Judge Andrew F. Marchese issues the following order.

***FINDINGS OF FACT***

1. For the years here at issue, petitioner operated a law practice in the State of New York. The Division of Taxation asserted that petitioner was a person required to collect, truthfully account for and pay over all of the tax withheld with respect to the law practice within the meaning of Tax Law § 685(n) and further asserted that petitioner had failed to properly do so. The Division of Taxation issued six notices of deficiency asserting a total of \$4,160.04 in penalty pursuant to the authority of Tax Law § 685(g). Petitioner requested a conciliation conference with the Bureau of Conciliation and Mediation Services, and on November 19, 2004, a conciliation order was issued sustaining the notices.

2. Petitioner filed a petition protesting the notices on December 13, 2004. In his petition, petitioner argued that the Division of Taxation had failed to give him credit for all of the withholding payments he had made. Included with the petition are photocopies of several checks payable to the "N.Y. State Dept. Of Taxation." A review of the photocopies reveals that two of the checks are for payments of New York State unemployment insurance. Two of the checks are for payment of personal income tax and were remitted with petitioner's 1994 and 1995 income tax returns. Only two of the checks are for payment of withholding tax.

Petitioner also alleged that the amount of tax due was improperly calculated, that the Division of Taxation failed to waive penalty and interest and improperly used a taxpayer identification number instead of his correct social security number.

3. On June 13, 2005, this matter was scheduled for a hearing before an administrative law judge to be held on July 21, 2005. At petitioner's request, the scheduled hearing was adjourned to September 14, 2005 and was also transferred to be heard before a small claims presiding officer. On August 8, 2005, a final notice of small claims hearing was mailed to the parties advising them that a small claims hearing would be held at the New York State Housing Finance Agency, 641 Lexington Avenue, Fourth Floor, New York, NY 10022, on Wednesday, September 14, 2005 at 1:15 P.M.

4. On September 14, 2005 at 1:15 P.M., Presiding Officer Joseph Pinto called the ***Matter of Ronald Saffner***, involving the petition here at issue. Present was Ms. D. Sealey as representative for the Division of Taxation. Petitioner did not appear, and no representative appeared on his behalf. The representative for the Division of Taxation moved that petitioner be held in default.

5. On September 22, 2005, Presiding Officer Pinto issued a determination finding petitioner in default.

6. By letter dated October 13, 2005, petitioner filed an application to vacate the September 22, 2005 default determination. In his application, petitioner indicated that he suffered a heart attack in August 2005 and since that date has been unable to fully attend to his duties. Petitioner attached to his application a note from his cardiologist, dated September 1, 2005, which states that petitioner was hospitalized from August 10, 2005 to August 23, 2005. The doctor's note also states that he had advised petitioner to reduce his work load, avoid stress and to avoid excess travel. Petitioner did not address the merits of his case in this application. By letter dated October 18, 2005, petitioner was given a second opportunity to prove that he had

a meritorious case. Petitioner submitted a letter dated November 3, 2005 containing the statements that:

1. The Department of Taxation has failed to credit me with all payment [sic] made (see itemization set forth in my letter of 11/15/04 annexed).
2. The Department of Taxation has improperly calculated and improperly imposed “penalties” which are unwarranted.
3. The Department of Taxation has acted arbitrarily and capriciously in denying my prior requests for a waiver [sic] of penalty and interest.
4. The Department of Taxation has improperly used employee [sic] identification number XX-XXXXXXX in calculating my taxes, which is incorrect, as I solely use my social security number of XXX-XX-XXXX. Therefore any tax calculated under the incorrect employee [sic] identification number are [sic] not for my account. (Actual numbers redacted).

Petitioner has submitted no actual proof which might tend to substantiate any of the claims he made in the above-quoted statements.

7. The Division of Taxation submitted a November 30, 2005 affirmation in opposition to petitioner’s application to vacate the default determination. The Division argued that petitioner failed to provide any evidence that he had actually suffered a heart attack or that connected his claimed heart attack with his failure to appear at the hearing. The Division also points out that petitioner failed to explain why he never notified the Division of Tax Appeals of his illness and failed to explain why he never sought an adjournment of his hearing. Finally, the Division asserts that petitioner has failed to present any evidence of merit to his case and has offered nothing more than unsupported self-serving statements.

### ***CONCLUSIONS OF LAW***

A. As provided in the Rules of Practice and Procedure of the Tax Appeals Tribunal, “In the event a party or the party’s representative does not appear at a scheduled hearing and an

adjournment has not been granted, the presiding officer shall, on his or her own motion or on the motion of the other party, render a default determination against the party failing to appear.” (20 NYCRR 3000.13[d][2].) The rules further provide that: “Upon written application to the supervising administrative law judge, a default determination may be vacated where the party shows an excuse for the default and a meritorious case.” (20 NYCRR 3000.13[d][3].)

B. There is no doubt based upon the record presented in this matter that petitioner did not appear at the scheduled hearing or obtain an adjournment. Therefore, the presiding officer correctly granted the Division’s motion for default pursuant to 20 NYCRR 3000.13(d)(2) (*see, Matter of Zavalla*, Tax Appeals Tribunal, August 31, 1995; *Matter of Morano’s Jewelers of Fifth Avenue*, Tax Appeals Tribunal, May 4, 1989). Once the default order was issued, it was incumbent upon petitioner to show a valid excuse for not attending the hearing and to show that he had a meritorious case (20 NYCRR 3000.13[d][3]; *see also, Matter of Zavalla, supra; Matter of Morano’s Jewelers of Fifth Avenue, supra*).

C. Petitioner has failed to demonstrate that he suffered a heart attack as he alleges in his request to vacate the default. Petitioner’s doctor is curiously vague in his letter and does not actually substantiate petitioner’s claims. Nevertheless, petitioner’s stay in the hospital of almost two weeks demonstrates to me that his medical problems were indeed severe and sufficient to explain his failure to appear at his hearing. Accordingly, I would conclude that petitioner has demonstrated reasonable cause for his failure to appear at his hearing.

D. In addition to showing that he had reasonable cause for his failure to appear at his hearing, petitioner must also demonstrate that he has a meritorious case. In this regard, petitioner alleges that the Department of Taxation has failed to credit him with all of the payments he has made. He has included photocopies of seven checks to prove this allegation.

However, contrary to petitioner's assertions, these checks do not prove that the Division of Taxation has failed to credit petitioner with any of his withholding tax payments. At best, they prove that petitioner made seven tax payments not all of which are relevant to the issues and tax years here in question. In fact, a review of the checks reveals that two of the checks constitute unemployment insurance payments and two other checks are payments made with petitioner's 1994 and 1995 personal income tax return. Petitioner has not explained how any of these payments is relevant to his withholding tax liabilities.

Of the three remaining checks, two contain deposit notations which indicate that the checks were payments of petitioner's withholding tax liability. However, petitioner has submitted no proof that he was not properly credited with these payments. The remaining check constitutes a payment made to "N.Y. State Dept. of Taxation." Nothing would indicate that this payment is a withholding tax payment or even a personal income tax payment. Petitioner has failed to show that this payment is in any way related to the issues at hand or that it was not properly credited for its intended purpose whatever that may be.

E. Petitioner also alleges that the Department of Taxation has improperly calculated and improperly imposed penalties which are unwarranted and has acted arbitrarily and capriciously in denying his requests for waiver of penalty. These statements are conclusory in nature and are unsupported by any proof whatsoever.

F. Petitioner alleges that the Department of Taxation has improperly used an employer identification number instead of his social security number. It is noted that in maintaining a law practice, petitioner is acting in the capacity of an employer. Petitioner is also responsible for personal income taxes as an individual. Petitioner has failed to articulate why the Division of Taxation has erred in treating him both as an employer and as an individual. Petitioner has also

failed to demonstrate that the Division of Taxation failed to properly credit him with any payment because of the use of the two numbers.

Accordingly, petitioner has failed to demonstrate that he has a meritorious case.

G. It is ordered that the October 13, 2005 request to vacate the default determination be, and it is hereby, denied, and the Default Determination issued on September 22, 2005 is sustained.

DATED: Troy, New York  
January 26, 2006

/s/ Andrew F. Marchese  
CHIEF ADMINISTRATIVE LAW JUDGE